Lee Boon Tien @ Lee Mun Teng & Ors v Hiap Lee (Petrol) Sdn Bhd & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–260 OF 2006(MT4)
KAMARDIN HASHIM JC
19 JUNE 2009

Civil Procedure — Injunction — Application for interlocutory injunction — Injunction to stop defendants from operating petrol station in premises — Whether there were serious triable issues — Whether inordinate delay in commencing action made it unjust to grant injunction — Whether application for injunction tainted by mala fide — Whether balance of convenience weighed in favour of plaintiffs

The petrol station at the present premises ('the premises') was situated in Johor Bahru on a parcel of land ('the land') owned by the second defendant, which was leased to Hiap Lee (Petrol) Sdn Bhd, the first defendant, for a term of 30 years commencing on 1 November 1986 and ending on 1 November 2016. On 1 January 2001, Shell appointed the first defendant as its dealer to manage and operate the petrol station ('the station'). The second defendant is and was at all material times a director and shareholder of the first defendant company. The defendants had obtained all necessary approvals from the local authority for the relocation of the station to the premises and the station had always been controlled, operated and managed properly and lawfully and in compliance with all the safety standards and guidelines set by the local authorities. On 27 March 2006, the plaintiffs initiated a writ action against the defendants on the grounds that the latter had committed acts of negligence and/or nuisance and/or trespass against the plaintiffs. Thereafter the plaintiffs proceeded with the present application for injunctive relief on the grounds, inter alia, that the second defendant had wrongfully granted the first defendant a lease for 30 years to construct a station in the middle of a residential area; that the location of the station in the area had endangered the health and safety of the plaintiffs in that they had experienced physical and emotional suffering as a result of being constantly exposed to gasoline fumes or petrol smoke; that the presence of vehicles at the premises caused loud noises which detrimentally affected the plaintiffs; that there was a risk of an explosion occurring due to the presence of an underground petrol storage tank at the premises. In reply the defendants submitted that the state authority of Johor had approved the second defendant's application to lease the land to Shell for a term of 30 years for the purposes of constructing and erecting a petrol station on the land and that the plaintiffs' allegation that the second defendant had irregularly or wrongfully granted the lease to Shell was

A entirely baseless and misconceived. The defendants also submitted that they had constructed a fence which served to keep out any pollution and/or emission of smell that may emanate from the station and that the smell emanating from the transference of the petrol or diesel from the oil tankers to storage tanks in the station was transient and immediately thereafter B dissipated by the wind. The defendants further submitted that the medical report adduced as evidence by the plaintiffs in their affidavit did not make an actual diagnosis of the illness suffered by the plaintiffs as a patient but merely repeated the patient's allegation that she had been exposed to petrol fumes. As such there was no conclusive evidence which would substantiate the plaintiffs' C allegation that the said patient had suffered from illness as a result of being exposed to petrol fumes. The primary issue to be resolved in this case was whether in the circumstances of this case an injunction should be granted against the defendants.

D **Held**, dismissing the plaintiffs' application with costs:

(1) The station had been in operation at the premises since 1986 but the plaintiffs' action was only initiated 20 years later, in 2006. Although the plaintiffs had explained their inordinate delay by inventing an E explanation that the defendants had allegedly given an undertaking to the second and fourth plaintiffs that they would relocate to another location within two years of the construction of the station, the contemporaneous conduct of the plaintiffs and the documentary evidence did not support the plaintiffs' explanation for the grossly F inordinate delay. The essence of an application for an interlocutory injunction, an equitable remedy, is that it should be made with promptitude, which in this case had not been met by the plaintiffs. The inordinate delay, that is 20 years, coupled with the lack of any credible explanation on the part of the plaintiffs had rendered the delay G inexcusable and made it unjust to grant the injunction as claimed against the defendants (see paras 28–29, 31–32).

(2) After taking into consideration the factual circumstances it was evident that the first to fourth plaintiffs had instigated this action out of bad faith. These facts showed that there were serious triable issues that H warranted a trial in this matter. Further the plaintiffs had not produced any evidence to support their allegations and had failed to make out a case for the said trespass, negligence and/or nuisance. The materials from the Internet which the plaintiffs relied upon were generic in nature and as such irrelevant to the crux of the plaintiffs' averments. The I evidence of the private investigator appointed by the plaintiffs could also not be relied upon as a basis to grant an injunction against the defendants when there was no evidence produced to support the private investigator's contentions regarding the purported smell from the station (see paras 27, 33, 35 & 39).

(3) The balance of convenience did not weigh in favour of the plaintiffs in this case as it would not be in the interest of justice to grant the interlocutory injunction based on the plaintiffs bare allegations which were not supported by any evidence. Further, the defendants would suffer great injustice by the granting of any injunctive relief sought by the plaintiffs (see para 36).

[Bahasa Malaysia summary

Stesen minyak di premis tersebut ('premis tersebut') terletak di Johor Bahru atas sebidang tanah ('tanah tersebut') yang dimiliki oleh defendan kedua, yang telah dipajak kepada Hiap Lee (Petrol) Sdn Bhd, defendan pertama, untuk tempoh 30 tahun bermula dari 1 November 1986 dan berakhir pada 1 November 2016. Pada 1 Januari 2001, Shell telah melantik defendan pertama sebagai peniaganya untuk menguruskan stesen minyak itu ('Stesen tersebut'). Defendan kedua merupakan dan adalah pada setiap masa matan pengarah dan pemegang saham syarikat defendan pertama. Defendan-defendan telah memperoleh semua kebenaran daripada pihak berkuasa negeri untuk peletakan semula stesen tersebut pada premis tersebut dan stesen tersebut sentiasa dikawal, dijalankan dan diuruskan dengan sewajarnya dan mengikut undang-undang dan mematuhi semua piawai keselamatan dan garis panduan yang ditetapkan oleh pihak berkuasa negeri. Pada 27 Mac 2006, plaintif-plaintif telah memulakan tindakan writ terhadap defendan-defendan atas alasan bahawa defendan-defendan telah melakukan perbuatan kecuaian dan/atau kacau ganggu dan/atau pencerobohan terhadap plaintif-plaintif. Berikutan itu plaintif-plaintif terus membuat permohonan ini untuk relief injunksi atas alasan, antara lain, bahawa defendan kedua secara salah telah memberikan pajakan untuk 30 tahun kepada defendan pertama untuk membina sebuah stesen di tengah-tengah kawasan perumahan; bahawa lokasi stesen tersebut dalam kawasan yang membahayakan kesihatan dan keselamatan plaintif-plaintif di mana mereka mengalami gangguan fizikal dan emosi akibat daripada sentiasa terdedah kepada asap gasolin atau asap petrol; bahawa kehadiran kenderaan-kenderaan di premis tersebut menyebabkan bunyi bising yang menjejaskan plaintif-plaintif; bahawa terdapat risiko berlaku letupan akibat kehadiran tangki penyimpanan minyak bawah tanah di premis tersebut. Dalam jawapan defendan-defendan berhujah bahawa pihak berkuasa negeri Johor telah membenarkan permohonan defendan kedua untuk memajak tanah tersebut kepada Shell untuk tempoh 30 tahun bagi tujuan membina dan mendirikan stesen minyak atas tanah tersebut dan dakwaan plaintif-plaintif bahawa defendan kedua secara luar aturan atau salah telah memberikan pajakan tersebut kepada Shell adalah tidak berasas langsung dan salah tanggap. Defendan-defendan juga berhujah bahawa mereka telah membina pagar bagi tujuan mengelakkan pencemaran dan/atau pengeluaran bau yang mungkin datang daripada stesen tersebut dan bahawa bau yang datang daripada pemindahan minyak petrol atau diesel daripada tangki minyak kepada tangki

penyimpanan di stesen tersebut adalah sementara dan dengan serta merta selepas itu hilang ditiup angin. Defendan-defendan selanjutnya berhujah bahawa laporan perubatan yang dikemukakan sebagai keterangan oleh plaintif-plaintif dalam afidavit mereka tidak membuat diagnosis sebenar tentang penyakit yang dialami oleh plaintif-plaintif sebagai pesakit tetapi hanya mengulangi dakwaan pesakit bahawa dia telah terdedah kepada asap petrol. Oleh itu tiada bukti konklusif yang boleh mengesahkan dakwaan plaintif-plaintif bahawa pesakit tersebut telah mengalami penyakit akibat daripada terdedah kepada asap petrol. Isu utama yang perlu diselesaikan dalam kes ini adalah sama ada dalam keadaan kes ini injunksi patut diberikan terhadap defendan-defendan.

Diputuskan, menolak permohonan plaintif-plaintif dengan kos:

(1) Stesen tersebut telah beroperasi di premis tersebut sejak tahun 1986 tetapi tindakan plaintif-plaintif hanya dimulakan 20 tahun kemudian, pada tahun 2006. Meskipun plaintif-plaintif telah menjelaskan kelewatan melampau mereka dengan mereka penjelasan bahawa defendan-defendan telah dikatakan memberi aku janji kepada plaintif-plaintif kedua dan keempat yang mereka akan beralih tempat semula kepada lokasi lain dalam masa dua tahun daripada pembinaan stesen tersebut, perlakuan semasa plaintif-plaintif dan keterangan dokumentar tidak menyokong penjelasan plaintif-plaintif untuk kelewatan yang melampau itu. Intipati permohonan untuk injunksi interlokutori, suatu remedi ekuiti, adalah bahawa ia patut dibuat dengan segera, di mana dalam kes ini tidak dipatuhi oleh plaintif-plaintif. Kelewatan melampau itu, iaitu selepas 20 tahun, disertakan dengan penjelasan yang tidak boleh dipercayai di pihak plaintif-plaintif mengakibatkan kelewatan yang tidak dapat dimaafkan dan menjadikannya tidak adil untuk diberikan injunksi sepertimana yang dituntut terhadap defendan-defendan (lihat perenggan 28–29, 31–32).

(2) Setelah membuat pertimbangan tentang keadaan faktual adalah jelas bahawa plaintif-plaintif pertama hingga keempat telah memulakan tindakan ini dengan niat jahat. Fakta-fakta tersebut menunjukkan bahawa terdapat isu-isu serius yang perlu dibicarakan yang mewajarkan perbicaraan dalam perkara ini. Bahkan plaintif-plaintif tidak mengemukakan apa-apa keterangan untuk menyokong dakwaan-dakwaan mereka dan telah gagal untuk membuktikan kes pencerobohan, kecuaian dan/atau kacau ganggu. Bahan-bahan daripada internet yang digunakan oleh plaintif-plaintif bersifat generik dan oleh itu tidak relevan kepada pokok penegasan-penegasan plaintif-plaintif. Keterangan penyiasat persendirian yang dilantik oleh plaintif-plaintif juga tidak boleh digunakan sebagai asas untuk memberikan injunksi terhadap defendan-defendan apabila tiada keterangan dikemukakan

bagi menyokong pendapat-pendapat penyiasat persendirian itu tentang bau yang dikatakan daripada stesen tersebut (lihat perenggan 27, 33, 35 & 39).

(3) Imbangan kesesuaian tidak berpihak kepada plaintif-plaintif dalam kes ini kerana ia bukan demi kepentingan keadilan untuk membenarkan injunksi interlokutori itu berdasarkan pengataan asas plaintif-plaintif yang tidak disokong oleh apa-apa keterangan. Selanjutnya, defendan-defendan akan mengalami ketidakadilan jika apa-apa relief injunksi yang dipohon oleh plaintif-plaintif dibenarkan (lihat perenggan 36).]

Notes

For cases on application for interlocutory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2889–2899.

Cases referred to

Ahmad bin Haji Bakar lwn Tenaga Nasional Bhd [2008] 4 MLJ 800, HC (refd)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)

American Cynamid v Ethicon Ltd [1975] AC 396, HL (folld)

Gan Chong Guan Transport Sdn Bhd v Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors [2009] 7 MLJ 193, HC (refd)

Government of Malaysia & Anor v Akasah bin Ahad [1986] 1 MLJ 396, SC (refd)

Kamalambikai w/o Somasundram & Anor v Mulpha Land & Property Sdn Bhd [1998] MLJU 173, HC (refd)

Kasim a/l Musa & Ors v Maniam a/l Raman [2001] 6 MLJ 696, HC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Syarikat Panon Sdn Bhd v Zecon Engineering Works Sdn Bhd [2005] 5 MLJ 609, HC (refd)

Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192, SC (refd)

Legislation referred to

Electricity (Amendment) Regulations 2003
Electricity Regulations 1994 reg 3
Petrol Development Act 1974 s 6(3)
Specific Relief Act 1950 s 50
Supply Control Regulations 1974 reg 4(1)

Ong Kow Meng (KM Ong Lee & Co) for the plaintiffs.
S Nathan Balan (Zul Rafique & Partners) for the defendants.

Kamardin Hashim JC:

THE APPLICATION

[1] Before me in encl 22 is the plaintiffs' application for an order of an injunction against the defendants, inter alia:

(a) that the defendants are to cease the Shell petrol station ('the station') operations operated by the defendants at No 202, Jalan Raya 81550 Gelang Patah, Johor Bahru ('the present premises') and to transfer the station to another location;

(b) that the defendants and/or their agents and/or their employees are restrained from emitting odours and/or petrol fumes from the station;

(c) that the defendants and/or their agents and/or their employees are restrained from allowing the emission of noise from vehicles on the present premises which are there for petrol filling purposes;

(d) that the defendants and/or their agents and/or their employees are restrained from causing the flow of black engine oil from the present premises into the public drains around the plaintiffs' residences;

(e) that the defendants and/or their agents and/or their employees are restrained from allowing the filling or transferring of petrol from petrol oil tankers to the petrol storage tank located underground at the present premises; and

(f) that the defendants and/or their agents and/or their employees are restrained from selling petrol on the present premises.

[2] The grounds forming the basis of the plaintiffs' application as contained in their affidavit in support affirmed by Ong Huey Shin on 24 March 2006 in encl 20 can be summarised as follows:

(a) the second defendant had irregularly or wrongfully granted a lease for a period of 30 years since December 2005 to Shell Malaysia Trading Sdn Bhd ('Shell') for the purpose of constructing the station in the middle of a residential area in the locality;

(b) the plaintiffs have been undergoing physical and emotional suffering as a result of the constant exposure to gasoline fumes or petrol smoke which in turn have endangered or threatened their health and caused substantial discomfort to them;

(c) the metal fencing constructed at the present premises has been inadequate in that it has failed to prevent fumes and smoke from the petrol from polluting the air space in the plaintiffs' residential area;

(d) the presence of vehicles at the present premises for petrol filling causes loud noises which detrimentally affect the plaintiffs;

(e) there is a risk of an explosion occurring due to the presence of an underground petrol storage tank at the present premises;

(f) as a result of the station's operations, black engine oil is discharged from the present premises, which then flows into the drains located in front of the residential lots owned by and/or resided in by several of the plaintiffs;

(g) the aforesaid effects due to the existence and operations of the station have been confirmed by the findings of a private investigation body that was appointed by the plaintiffs; and

(h) that the defendants are purportedly negligent and/or are committing acts of nuisance and/or trespass.

[3] The following are the cause papers that have been filed herein in so far as they relate to the plaintiffs' application. They are:

(a) the writ of summons and statement of claim dated 27 March 2006 (encl 21);

(b) the plaintiffs' application for injunctive relief made by way of summons in chambers dated 6 April 2006 (encl 22);

(c) the plaintiffs' affidavit in support affirmed by Ong Huey Shin on 24 March 2006 (encl 20);

(d) the plaintiffs' affidavit in support affirmed by Lee Boon Tien @ Lee Mun Teng on 24 March 2006 (encl 4);

(e) the plaintiffs' affidavit in support affirmed by Choon Swee Len on 24 March 2006 (encl 5);

(f) the plaintiffs' affidavit in support affirmed by Lee Ming Kwang on 24 March 2006 (encl 6);

(g) the plaintiffs' affidavit in support affirmed by Lee Ming Yen on 24 March 2006 (encl 7);

(h) the plaintiffs' affidavit in support affirmed by Ng Wah on 24 March 2006 (encl 8);

(i) the plaintiffs' affidavit in support affirmed by Tan Yam Liak on 24 March 2006 (encl 9);

(j) the plaintiffs' affidavit in support affirmed by Yeo Yan Lai on 24 March 2006 (encl 10);

(k) the plaintiffs' affidavit in support affirmed by Lee Ah Kau on 24 March 2006 (encl 11);

(l) the plaintiffs' affidavit in support affirmed by Lee Hwai Kwan on 24 March 2006 (encl 12);

(m) the plaintiffs' affidavit in support affirmed by Chong Oi Chan on 24 March 2006 (encl 13);

(n) the plaintiffs' affidavit in support affirmed by Lee Hoi Hong on 24 March 2006 (encl 14);

(o) the plaintiffs' affidavit in support affirmed by Tan Kok Chai on 24 March 2006 (encl 15);

(p) the plaintiffs' affidavit in support affirmed by Sim Geok Bee on 24 March 2006 (encl 16);

(q) the plaintiffs' affidavit in support affirmed by Tan Swee Lan on 24 March 2006 (encl 17);

(r) the plaintiffs' affidavit in support affirmed by Balasubramaniam s/o Perumal on 24 March 2006 (encl 21);

(s) the defendants' first affidavit in reply affirmed by Lim Teng Yeow @ Lim Peng Yau on 28 August 2006 (encl 27);

(t) the defendants' second affidavit in reply affirmed by Lim Teng Yeow @ Lim Peng Yau on 28 August 2006 (encl 28);

(u) the statement of defence dated 28 August 2006 (encl 29);

(v) the plaintiffs' affidavit in reply affirmed by Subramaniam s/o Perumal on 9 October 2006 (encl 31);

(w) the plaintiffs' affidavit in reply affirmed by Ong Huey Shin on 9 October 2006 (encl 32);

(x) the reply to defence dated 11 October 2006 (encl 34);

(y) the defendants' third affidavit in reply affirmed by Lim Teng Yeow @ Lim Peng Yau on 13 December 2006 (encl 39);

(z) the plaintiffs' further affidavit in reply affirmed by Ong Huey Shin on 13 December 2006 (encl 46); and

(aa) the defendants' fourth affidavit in reply affirmed by Lim Teng Yeow @ Lim Peng Yau on 28 March 2007 (encl 50).

BACKGROUND FACTS

[4] The first defendant, Hiap Lee (Petrol) Sdn Bhd (Hiap Lee) was a

company owned by members of the second defendant's family. Hiap Lee was a dealer of Shell since the 1950s. Hiap Lee operated the station at the 5-foot way of Jalan Raya, 81550 Gelang Patah, Johor Bahru. However, sometime in the mid 1980s, as a result of a directive issued by the authorities, Hiap Lee relocated the station to the present premises. The relocation was done after the requisite approvals had been obtained and the relevant laws and regulations were complied with. The station has been in operation at the present premises since 1986. The station at the present premises is located on a parcel of land owned by the second defendant and held under HS (D) 124888 MLO 1651B, Mukim Pulai, Daerah Johor Bahru, Negeri Johor ('the land'). By way of a lease dated 1 November 1986 ('the lease'), Hiap Lee was granted a lease of the land for a term of 30 years commencing on 1 November 1986 and ending on 1 November 2016 on the terms and conditions as provided for in the annexure to the lease.

[5] On 1 January 2001, Shell and Hiap Lee entered into a retailer licence agreement ('RLA') whereby Shell appointed Hiap Lee as its dealer to manage and operate the station (exh LTY3 of encl 27). The second defendant is and has been a director and shareholder of Hiap Lee since 1 June 1994. All relevant approvals from the local authority were obtained prior to the relocation of the station to its present premises. Furthermore, the station was and has always been controlled, operated and managed properly and lawfully and in compliance with all the safety standards and guidelines set by the government and/or local authorities. In connection thereto, the following are the necessary approvals, permits and/or licenses issued by the relevant authorities to enable the continued lawful operation and management of the station:

(a) The PDA Licence No 3178 dated 9 June 2003 that was issued pursuant to s 6(3) of the Petrol Development Act 1974 by the Ministry of Internal Trade and Consumer Affairs;

(b) The Business Licence No PR00470K issued pursuant to reg 4(1) of the Supply Control Regulations 1974 by the Ministry of Internal Trade and Consumer Affairs;

(c) The Certificate of Registration (Form B) issued pursuant to reg 3 of the Electricity Regulations 1994 by the Suruhanjaya Tenaga; and

(d) A business licence issued by the Municipal Council of Johor Bahru Tengah.

[6] During the construction of the station or within a reasonable time thereafter, there were no complaints and/or objections forthcoming from the plaintiffs herein regarding the existence of the station at the present premises.

[7] I shall now deal with all the grounds forming the basis of the plaintiffs' application herein, the legal position and the plaintiffs' application as a whole, as follows.

THE GRANTING OF A LEASE TO SHELL

[8] The plaintiffs' allegation that the second defendant had irregularly and/or wrongfully granted a lease to Shell is entirely baseless and misconceived. The title of the land expressly contains the following condition as imposed by the Pengarah Tanah dan Galian Negeri Johor (see exh LTY1 in encl 27):

> Tanah yang terkandung di dalam hakmilik ini hendaklah digunakan semata-mata untuk tapak dan sebuah Pam Minyak sahaja untuk perniagaan dibina mengikut pelan yang diluluskan oleh Majlis Daerah Johor Bahru Tengah.

[9] Furthermore, in a meeting held on 7 April 1987, the State Authority of Johor had approved the second defendant's application to lease the land to Shell for a term of 30 years for the purposes of constructing and erecting a petrol station on the land. This was duly confirmed by way of a letter dated 27 April 1987 issued by the Pejabat Pengarah Tanah dan Galian Johor whereby the following was, inter alia, stated therein (see exh LTY5 in encl 27):

> Permohonan kebenaran untuk Memajak Kecil Tanah HS(D) 124888 Mlo.1651, Mukim Pulai, JB.
>
> Adalah dimaklumkan iaitu Kerajaan Johor dalam Mesyuarat Majlis Kerajaan (Ex.Co) pada 7.4.87 (R/M: 479/87) telah meluluskan permohonan tuan-tuan untuk memajak kecil tanah diatas kepada Tetuan Shell Malaysia Trading Sendirian Berhad bagi tujuan membina sebuah stesyen Pam Minyak diatas tanah tersebut.
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> 2. Pemajakan kecil tersebut ialah selama 30 tahun yang bermula pada 1.11.1986 dan akan luput tempohnya pada 1.11.2016.

[10] In view of the aforesaid authorisation issued by the Pejabat Pengarah Tanah dan Galian Johor to be read and considered with the approvals, permits and/or licenses issued by the relevant authorities to enable the continued lawful operation and management of the station, I hold that the lease to Shell was lawfully and regularly granted. As such, the plaintiffs' averment regarding this issue is clearly untenable and is devoid of any basis in fact and in law. Indeed if the plaintiffs are questioning the legality of the lease, the appropriate proceedings ought to have been commenced against, inter alia, the approving public authorities. The legality of the lease may not be impunged in an action in private law such as the present action. In respect of this issue, I would like to refer to the case of *Gan Chong Guan Transport*

Sdn Bhd v Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors [2009] 7 MLJ 193 where it was held at p 194 as follows:

> The procedures as laid down by O 53 of the RHC is exclusive to cases whereby application by way of judicial review is mandated. In public law matters such as the plaintiff's application herein to challenge the decisions made by the first and second defendants which, no doubt are public authorities or where the plaintiff was seeking relief or remedy for the infringements of rights protected by public law, the proper route was by way of an application for judicial review to declare that the decisions made thereunder were null and void. Such mechanism was only afforded by invoking the provisions of O 53 of the RHC. Failure to comply with the above procedure was an abuse of the process of the court and an attempt to circumvent or evade the clear requirements of O 53 of the RHC.

THE PLAINTIFFS' EXPOSURE TO GASOLINE FUMES OR PETROL SMOKE

[11] The plaintiffs' contention that they had experienced physical and emotional suffering as a result of being constantly exposed to gasoline fumes or petrol smoke is entirely unsupported by any cogent or compelling evidence. The defendants have constructed a fence that separate the station from the residential lots, whereby this fence also serves to keep out any pollution, emission of smell and/or odour that may emanate from the station. I found that from the affidavit evidence, the oil tankers do not come to the station on a daily basis but only at a rate of about three to four times a week. There is no proof that the discharge of petrol or diesel from these oil tankers into the ground storage tanks, if any, would causes a strong and pungent smell that lasts for several hours a day as alleged by the plaintiffs. This is based on the facts that, firstly, the transfer of petrol or diesel from the oil tankers into the underground storage tanks usually lasts for only about 30 to 60 minutes per day. The smell emanating from the transference of the petrol or diesel is transient and immediately thereafter dissipated by the wind. The smell of petrol or diesel in itself is transient and does not last for several hours as alleged by the plaintiffs. Secondly, the vent pipes through which most of the vapour is released are situated at the back of the station and away from the neighbouring houses. These vent pipes were also elongated and affixed with elbows to ensure that the vapour and/or fumes do not gather towards the direction of the neighbouring houses.

[12] In encl 20, the plaintiffs had exhibited a copy of a purported medical report which allegedly proves the detrimental effects experienced by the plaintiffs as a result of being exposed to the petrol vapour and/or fumes (exh OHS3). An extract of the medical report prepared by Dr Diong Kok Wah from the Puteri Specialist Hospital Johor Bahru states that the patient had '*claimed to have been exposed to petrol fumes. The risk of inhalation of fumes*

can lead to risk respiratory disorder'. I find that based upon the wording of this medical report it is apparent that Dr Ding Kok Wah did not make an actual diagnosis of the illness suffered by the patient but merely repeated the patient's allegation that she had been exposed to petrol fumes. As such, there is no conclusive evidence and/or proof which would substantiate the plaintiffs' allegation that the said patient had suffered from illness as a result of being exposed to petrol fumes. In any event, the plaintiffs have failed and/or omitted to tender any scientific or conclusive proof that petrol fumes cause giddiness and nausea amongst adults and/or children as the plaintiffs have contended. In the present circumstances, there is no scientific or credible medical evidence to substantiate the plaintiffs' allegation of a cause and effect relationship.

[13] To further substantiate their allegations, the plaintiffs have also produced an article obtained from the Internet which purportedly discusses the hazards of petrol and petroleum filling station (exh OHS5 of encl 20). However, after perusal of this article clearly shows that it is largely irrelevant to the matters forming the basis of the present suit as it merely provides a short discussion of petrol as well as the general safety and precautionary measures to be taken when handling petrol at petrol filling stations. As such, this article is wholly immaterial as it is generic in nature and does not in any manner substantiate the plaintiffs' allegations that they have experienced emotional and physical suffering in the circumstances. Therefore, I hold that the plaintiffs have failed to proof scientifically, medically or conclusively that the petrol fumes or vapors had produced the physical and/or mental effects on the said plaintiffs as alleged in their affidavits.

[14] The purported professional report and the so-called independent investigation carried out by the private investigation body, whereby the alleged findings are contained in encl 21 are unsubstantiated by any cogent evidence whatsoever and does not in any manner conclusively prove the plaintiffs' spurious allegations that the station had caused the emission of poisonous gas and odour that affect the surrounding neighborhood. This report merely states that the so-called investigator was at the station for three days, whereby on one of those days he alleges that he '*could sense the strong gasoline smell from the petrol tanker*' at a distance of approximately 20 feet, whilst on another day, he contends that he could '*sense the bad odour of gasoline from the tanker*' from approximately 30 feet away. It is crucial to note that these are bare allegations made by an individual who is paid by the plaintiffs in order to produce his report. The report is woefully lacking in any corroborating details and particulars in order to show that there was an emission of poisonous gas and odour as contended by the plaintiffs. Further, the credentials of the so-called investigator is also woefully lacking. In short, there is no scientific nor conclusive proof that transient petrol vapour or

fumes causes giddiness and/or nausea amongst adults and/or children as alleged by the plaintiffs.

LOUD NOISES CAUSED BY VEHICLES AT THE STATION

[15] The residential area is located at a main road known as Jalan Raya, 81550 Gelang Patah, Johor Bahru. In view of this fact, it is entirely probable that the loud noises which the plaintiffs allege can be heard in and around the residential area are almost entirely contributed by the flow of traffic on the said main road. From the pictures taken by the so-called private investigator employed by the plaintiffs, clearly showed that the station adjoins a busy road whereby traffic activity on this road would be a major or primary cause to the noise heard by the plaintiffs. Therefore, one cannot say for sure that the noises complained off by the plaintiffs were actually from the station.

THE RISK OF EXPLOSION CAUSED BY THE UNDERGROUND STORAGE TANK

[16] I accept the defendants explanations that Hiap Lee has complied with all safety standards, rules and regulations that regulate the filling of petrol or gasoline into the underground storage tanks. Established studies have shown that the most effective and safest manner in which to store petrol is by way of underground storage tanks situated beneath the petrol station. This is also the standard practice in the industry which has in turn been complied with by Hiap Lee. The defendants also in their affidavits avers that the station had been duly certified by the Johor Bahru Fire Department to be safe and fit for occupation and that all the necessary requirements and/or safety standards have been complied with. The fire department has also conducted routine checks at the present premises and certificate of fitness issued. The defendants has exhibited two letters from the fire departments, contents of which are as follows:

> Sukacita dimaklumkan, pemeriksaan ke atas premis perniagaan/ perusahaan tersebut telah dilakukan oleh Pegawai dari Jabatan ini pada 1.2.1989 dan mendapati semua kehendak-kehendak Bomba TELAH dilaksanakan (exh LTY6 encl 27).
>
> Sukacita dimaklumkan bahawa pemeriksaan ke atas premis tersebut telah dilakukan oleh Pegawai dari Jabatan ini pada 15.7.2005 dan didapati tuanpunya premis telah mematuhi syarat dan keperluan keselamatan kebakaran (exh LTY6 encl 27).

[17] As the evidence adduced by the defendants are sufficient to show that they have taken all the necessary precautionary steps and measures to ensure that the underground petrol storage tanks which is a safe distance away from

residential lots and houses, I find that the plaintiffs worries are unfounded and cannot be accepted. The plaintiffs' claim that they are exposed to the risk of explosion of the storage tanks is entirely misconceived.

DISCHARGE OF BLACK ENGINE OIL FROM THE STATION

[18] From the affidavit evidence, the plaintiffs' allegations are susceptible and untrue based upon the following factual circumstances. First, that at all material times there is an oil interceptor located near the underground storage tanks at the station. The said oil interceptor functions as an oil trap that prevents the petrol and/or diesel from flowing into the public drains located in the housing estate. Secondly, it is inconceivable for black engine oil to flow into the drains of the station or into the public drains due to the reasons that the station does not have an on-site servicing unit and the flow in the public drains are against the station. The images as shown in exh OHS4 of encl 20 are visually unclear and difficult to discern and cannot be accepted as conclusive evidence to prove the plaintiffs' allegations in regards to this issue.

THE DEFENDANT'S PURPORTED ACT OF NEGLIGENCE, NUISANCE AND/OR TRESPASS

[19] After perusing all the affidavits filed before me, I am unable to find proof the defendants have committed negligence and/or nuisance and/or trespass. The plaintiffs have failed to prove their case against the defendants in that they failed to show the existent of he following essential factors to prove defendants committed negligence/nuisance/trespass, they are:

(a) that there has been any element that has escaped the present premises/the station which has in turn caused mischief to the plaintiffs/their properties;

(b) that the defendants have been negligent in any manner in the storing of petrol/in respect of any other of Hiap Lee commercial activities/operations that are carried out at the station; and

(c) that the defendants have entered or encroached into the plaintiffs' land whereby such entry would constitute/amount to trespass.

[20] In the case of *Government of Malaysia & Anor v Akasah bin Ahad* [1986] 1 MLJ 396, Lee Hun Hoe CJ (Borneo) described nuisance, trespass and negligence and the distinction between them, as follows:

> Nuisance is a wider class than trespass. Whether it is a trespass or a nuisance depends upon whether or not there is a direct physical interference. We do not think this is one of those cases which are described in the books as nuisance of a

particular kind analogous to trespass. (see *Jones v Llanrwst Urban District Council* [1911] 1 Ch 393 and *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84). As *Clerk & Lindsell on Torts* (14th Ed) at p 819 para 1412 says:

> The distinction between trespass and nuisance is the old distinction between trespass and case. Trespass is a direct entry on the land of another, and is actionable per se, without proof of special damage, but nuisance is the infringement of the plaintiff's interest in property without direct entry by the defendant, and generally actionable only on proof of special damage …

[21] Further down in the same case His Lordship opined:

> On the evidence we agree with the submission of the defendants that the plaintiff has failed to establish negligence. That is also the view of the learned judge. The defendants had not acquired the plaintiff's land. Neither had they entered the plaintiff's land. It is not in dispute that the land in question is federal reserve land. We cannot see how the plaintiff could in the circumstances succeed in trespass on the facts of this case. Where an occupier of premises adjoining the highway who has suffered damage as a result of works carried out lawfully in the extension of the highway the person who suffered the damage cannot recover in trespass in the absence of negligence on the part of the person who caused the damage. That principle of the common law has been laid down as early as 1877 in *The River Wear Commissioners v William Adamson & Ors* (1877) 2 App Cas 743.

THE LEGAL POSITION ON THE GRANTING OF AN INJUNCTIVE RELIEF

[22] The power of the court to grant an injunction is provided for in s 50 of the Specific Relief Act 1950 (Act 137) which provides as follows:

> 50 Preventive relief how granted
>
> Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

[23] The principles pertaining to the granting or refusal of an injunction are set out in the leading case of *American Cynamid v Ethicon Ltd* [1975] AC 396 wherein the House of Lords had, inter alia, stated that:

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where the 'balance of convenience' lies ...

[24] The guiding principle of 'balance of convenience' is further explained at pp 407 and 408 wherein it is, inter alia, stated that:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts … nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial … So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, … (if) the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial …

[25] Based on the salutary principles established by the House of Lords in *American Cynamid Co v Ethicon Ltd*, it becomes the duty of this court to consider the following matters when deciding on whether to exercise its' discretion to allow an injunction:

(a) whether there are any bona fide serious question to be tried;

(b) where the balance of convenience lies;

(c) whether damages is an adequate remedy for the plaintiffs in the circumstances;

(d) whether the plaintiffs have given an adequate undertaking as to damages; and

(e) whether there has been full and frank disclosure of all material facts on the plaintiffs' part.

[26] In the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, the Court of Appeal noted that a judge hearing an application for an interlocutory injunction should:

(1) ask himself if whether the totality of the facts presented before him disclosed a bona fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and decide whether they are serious enough to merit a trial …,

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

THE PLAINTIFFS' APPLICATION AND FINDINGS OF THE COURT

[27] It is my finding that the plaintiffs' application for a mandatory injunction is misconceived and premature as it presupposes the following:

(a) that the plaintiffs' allegations about the purported harmful effects of the station are spurious and untenable as there is no incontrovertible evidence of these purported effects;

(b) that the station is being operated lawfully in the present premises and the defendants have all the necessary approvals, permits and/or licences being issued and/or being in place;

(c) the materials from the internet, which the plaintiffs rely upon are generic in nature, are irrelevant to the crux of the plaintiffs' averments, and the source of which are unknown cannot be relied upon as a basis to relocate of Hiap Lee business;

(d) that the evidence of a private investigator who was appointed by the plaintiffs cannot be relied upon as a basis to grant an injunction as against the defendants when in fact there is no evidence produced to support the private investigator's contentions regarding the issue of the purported smell and/or fumes from the station; and

(e) the plaintiffs' allegations that the defendants have committed acts of, inter alia, trespass, negligence or nuisance are inherently incredible.

Indeed, a perusal of the contents of the affidavits indicates that the plaintiffs have not produced any evidence to support the allegations and as such have failed to make out a case for the said trespass/negligence/nuisance.

[28] It is indisputable that the station has been in operation at the present premises since 1986. This action was only initiated 20 years later ie in the year 2006. In the circumstances, it is also not disputed that the plaintiffs had failed or refused or omitted to mount or raise the appropriate objections to the relevant authorities during the construction phase of the station. As the plaintiffs were aware of or ought to be aware of the facts relating to the construction and/or the continued operation of the station, the plaintiffs are guilty of acquiescence, laches and inordinate delay in initiating this action about 20 years after the construction of the station. In this regard it is necessary to note that the plaintiffs' original case was that the defendants had only recently setup and commence operations in the location as disclose in their affidavit in support at para 10, as follows:

10. Sebenarnya Defendan-Defendan sebelum mewujudkan sebuah Stesyen Pam Minyak Shell atas Lot 202 dalam awal tahun 1990 an, mereka telah menggunakan tempat lain dan cuma baru-baru ini sahaja mereka telah berpindah ke tempat sekarang iaitu di Lot 202.

[29] That averment was put in by the plaintiffs to give the impression that the defendants had just moved in the location and commenced their petrol station operations. In truth, the defendants have been in operation at the same site since the late 1980's. The evidence with this regard may be found in paras 12 and 13 of the defendants' first affidavit in reply in encl 27. This has not been credibly denied by the plaintiffs. Instead what the plaintiffs have done in order to explain their inordinate delay was to invent an incredible explanation ie that the defendants had allegedly given an undertaking to the second and fourth plaintiffs that they would relocate to another location within two years of the construction of the station. The implausibility and improbability of such an undertaking is obvious and apparent. It should be noted that the defendants have totally denied and repudiated the plaintiffs allegations in this regard as in their affidavit in reply in encl 39 and encl 50. The contemporaneous conduct of the plaintiffs and the documentary evidence does not support the plaintiffs' explanation for the grossly inordinate delay. The plaintiffs inaction may be describe as that the plaintiffs have waived their rights to initiate or maintain this action against the defendants. The plaintiffs are further barred or stopped by their acts or omission, laches and delay in initiating this action and claim against the defendants.

[30] In the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, His Lordship Edgar Joseph Jr J (as His Lordship then was) explained the differences of laches, acquiescence and waiver in these terms:

> Laches
>
> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181,1182. Laches has been succinctly described as 'inaction with one's eyes open'.
>
> Now, can lapse of time and delay, however gross, in a suit seeking final, as opposed to interlocutory relief, of itself amount to the equitable defence of laches. It is clear that delay in some circumstances can amount to evidence from which the inference can be drawn that the plaintiff has released (or waived, there seems to be no difference) the claims which he asserts: lapse of time always gives rise to a presumption that a stale suit is ill-founded; for a reasonable man is not likely to sleep on his claims if they are well-founded. Whether it does or does not is a question of fact in each case.
>
> Acquiescence
>
> The term 'acquiescence', like the term 'laches', is confusingly used in different senses. Three should be referred to: (a) it can refer to the type of estoppels of which *Ramsden v Dyson* (1866) LR 1 HL 129 is a example. It is this meaning which Lord Cottenham LC in *Duke of Leeds v Earl of Amherst* 41 ER 886 said was the primary meaning of the term. Poole J in *Glasson v Fuller* (1922) SABL 148 thought likewise; (b) it can refer to an element in one of the two kinds of laches, viz the action of a plaintiff over a long period of time, with full knowledge of his rights, refraining from exercising his rights in circumstances where it can properly be inferred that he has abandoned them. This is waiver, affirmation, release. This is the sense in which Hanbury uses the term when he says: 'The chief element in laches is acquiescence'; (c) finally, as is evident from the question of Lord Wensleydale's speech in *Archbold v Scully* (1861) 9 HCL 360 the term 'acquiescence' can be used as referable only to the second type of laches considered in this chapter, ie the type of laches which involves prejudice to the defendant or to third parties.
>
> Waiver
>
> Sir Alexander Turner in *Estoppel by Representation* (3rd Ed) pp 319–320 takes the view waiver is not capable of exact definition. In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at p 655, Mason J repeated Lord Wright's dictum (uttered

in *Ross T Smyth v TD Bailey and Son* [1940] 3 All ER 60 at p 70) that waiver was a vague term used in many senses. The truth of the matter was put by Cardozo J in *Beatty v Guggenheim* (1919) 122 NE 378 (at p 381). That learned judge said that: 'Much of the trouble comes from the use of the misleading word 'waiver'… It is made to stand for many things — sometimes for estoppels, sometimes for contract, sometimes for election'. In so speaking Cardozo J was no doubt aware of what had been stated two years before by Ewart in his book *Waiver Distributed* at p 13, namely:

> Commencing with 'waiver', we may say that (if it is anything) it is (it certainly used to be) of unilateral character. The possessor of some property throws it away. The effect may be that, someone else is benefited, but 'waiver' has no relation to benefits. A watch is thrown away, and some functionary or finder is so much the richer (if the true owner does not intervene). But the 'waiver' is complete although the watch be never found, although it be flung into the ocean.
>
> Election is 'waiver's' nearest neighbor, for it, too, is unilateral. But in election, the act has a legal effect upon the relationship between two persons, or upon the legal right of some party. 'Waiver' has no such effect. 'Waiver' implies that you have something, and that you are throwing it away …

[31] Perusal of the plaintiffs' affidavits will also reveal that other than putting forward a spurious and incredible suggestion in the affidavits with regards to an alleged undertaking by the defendants, the plaintiffs have failed to provide any credible explanation for the delay by the plaintiffs in initiating the present suit as against the defendants. As with all equitable reliefs, delay is a relevant factor in interlocutory proceedings for injunctive relief. The essence of all an application for an interlocutory injunction is that it should be made with promptitude, a requirement which in this case has not been met by the plaintiffs. In the case of *Kasim a/l Musa & Ors v Maniam a/l Raman* [2001] 6 MLJ 696, the court had inter alia stated at p 713 that:

> The court shall now consider the question where the balance of convenience lies.
>
> In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, the Supreme Court affirmed the principle that the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever cause that appears to carry the lower risk of injustice.
>
> In my view, the circumstances in which the application was filed shows that there would be more injustice to the defendant if the injunction is granted. Here, it has taken the plaintiffs eight months to apply to set aside the consent judgment after the consent judgment was recorded and after the defendant and his counsel had gone to Restoran Ehsaniah to close the shop. No explanation, let alone a reasonable explanation, has been put forth by the plaintiffs for the delay.
>
> Since an injunction is an equitable remedy and equity will only assist the vigilant and not those who sleep on their rights, *vigilantibus, non dermientibus, jura subeniunt*, the conduct of the parties, in particular, the unreasonable delay on the

part of the plaintiffs in filing this application (encl 4) is a relevant factor … The essence of an application for an interlocutory injunction is that it should be made with promptitude …

An interlocutory injunction will not be granted if the plaintiffs, having sufficient notice of the defendant's intention to commit the act, sought to be restrained, is guilty of unreasonable delay in applying to the court …

In my opinion, after applying the principles which have been laid down in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366, regarding the issue of delay to the facts of the present case, I find that there has been inordinate delay on the part of the plaintiffs in applying for the interlocutory injunction. I also find that this inordinate delay is inexcusable. Finally, for reasons already set out in the foregoing paragraphs, I find that the defendant is likely to be seriously prejudiced by the delay such that it would make it unjust to grant the injunction claimed.

[32] The inordinate delay, which in this case is for a length of 20 years coupled with the lack of any credible explanation on the part of the plaintiffs in order to justify and/or explained the same has rendered the said delay inexcusable and has in turn made it unjust to grant the injunction as claimed against the defendants.

[33] The other aspect of the plaintiffs application here to me is that by looking at the facts of the case, the plaintiffs application here is tainted by mala fide and bad faith. My findings was essentially based on the following facts and circumstances:

(a) There were no complaints about the operation of the station from its inception in 1986 until the parties had a falling out. The arguments stemmed from the second plaintiff's unhappiness with the second defendant's refusal to remove several pieces of the metal fence separating the residential houses from the station despite the second defendant's explanation that the said metal fence was necessary for safety reasons. The first to fourth plaintiffs also did not accept the second defendant's explanation that the station was built in accordance with the requirements of the law.

(b) As a result of the aforesaid falling out between the parties, the second defendant frequently faced problems with the first to fourth plaintiffs. One of the issues that was in contention between the parties was the indiscriminate placing of rubbish and twigs outside Lot 203 by the fourth plaintiff, which led to the said rubbish and twigs falling into the drain adjoining the station in the event of rain. This would then lead to the said drain being clogged. To this, the second defendant has written a letter of complaint to the local authority enclosing pictures of the clogged drains.

(c) Based on the letter of complaint from the second defendant, the fourth plaintiff had been investigated by the local authority.

(d) As a result of the above stated factual circumstances, it is believed that the first to fourth plaintiffs has instigated this action out of bad faith.

(e) The defendants have also been detrimentally affected as a result of the clogged drains near the station and with this the defendants is being exposed to censure or penalty imposed by the local authority, and the possibility that the operations of the station being disrupted.

(f) The defendants concludes that in view of the above, the suit herein by the plaintiffs is irretrievably tainted by mala fide and bad faith.

[34] In the case of *Syarikat Panon Sdn Bhd v Zecon Engineering Works Sdn Bhd* [2005] 5 MLJ 609 it was held, inter alia, that:

> [60]The discretion which the court exercise in the grant or refusal of an injunction is an equitable one. The court is always sensitive to the conduct of the parties before it, and it is well accepted that he who seeks equity must do equity. Here the facts show that the plaintiff allowed the defendant to take over the disputed works and was fully aware of what the defendant was doing. It stood by for some five months before coming to court and has not said a words about why it waited so long. Having allowed the defendant to take over and get on with the disputed works for five months, the plaintiff tried to disrupt the defendant's works by blocking the only entrance to the FRST-EL building site. The plaintiff says that its action was merely to reassert control and possession of the site and that the ingress and egress of workers was not affected by its action. If that is what the plaintiff really intended, could it not be achieved without having to dig a trench across the only entrance to the site? The fact that the plaintiff went to such an extent shows that it was bent on putting pressure on the defendant through the disruption of its works. The plaintiff has not come to court with clean hands.

[35] After taking into consideration all the matters as discussed above, I find that there are issues that warrant a trial in this matter. However, the primary issue that must be resolved herein is whether in the circumstance, an injunction should be granted against the defendants. In this respect, I would like to refer to a passage by Syed Agil Barakbah SCJ in the case of *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 at p 193, thus:

> The discretionary power of the court to grant a mandatory injunction is provided by s 53 of the Specific Relief Act 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine*

Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 and confirmed by the Federal Court in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result (see *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 and *Shepherd Homes Ltd v Sandham* [1971] 1 Ch 340).

[36] The balance of convenience does not weigh in favour of the plaintiffs in this case as it would not be in the interest of justice to grant the interlocutory injunction based on the plaintiffs bare allegations which are not supported by any evidence. Furthermore, the defendants would suffer great injustice and will be jeopardised by the granting of any injunctive relief sought by the plaintiffs. This is based on the facts that the station has been in operation since 1986 ie almost 20 years and if injunctive relief is granted, it would cause the defendants to suffer massive financial and/or commercial losses which the defendants estimated around RM15,000 per month. The injunctive order also will bring difficulties and inconveniences to the members of the public at large in Gelang Patah area as there are only a scant number of petrol stations situated in the vicinity.

[37] The plaintiffs have not adduced any evidence to demonstrate that they have suffered losses to compel this court to grant the remedies sought in their application particularly due to their delay in initiating this claim. In their statement of claim, the plaintiffs have also prayed for a sum of RM600,000 as general damages. This indicate that damages is an adequate remedy in the circumstances. In this respect, I would like to refer to the case of *Ahmad bin Haji Bakar lwn Tenaga Nasional Bhd* [2008] 4 MLJ 800 where it was decided that an injunction would be refused if damages are quantified and claimed by the plaintiff. His Lordship Zainal Azam J in that case has this to say:

> [19] Satu perkara yang juga menghalang permohonan plaintif untuk mendapatkan perintah-perintah injunksi ialah kerana plaintif juga telah memohon ganti rugi bagi amaun tertentu, iaitu RM3.4 juta. Ia bermaksud bahawa plaintif akan berpuas hati dengan ganti rugi yang mengikutnya boleh dibuktikan amaunnya. Adalah menjadi prinsip asas undang-undang injunksi bahawa perintah injunksi tidak boleh diperolehi bagi apa-apa kesalahan yang boleh diambil tindakan sekiranya ganti rugi merupakan remedy yang betul dan mencukupi (mengikut Lindley LJ dalam kes *London & Blackwell Railway Co v Cross* (1886) 31 Ch D 354 di ms 369). Hashim Yeop A Sani HB (Malaya) dalam kes *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408 telah menjelaskan rasionalnya seperti berikut:

A

> But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of preventing irreparable damage.

B

[38] The plaintiffs in this case have also not shown proof of their financial standing to make good their undertaking, purportedly given under para 1 of their affidavit in support in encl 20 and in encl 4 to encl 17. As such, there C has been no evidence produced in order to support the plaintiffs' so-called undertaking as to damages, which in the present case remain a mere bare averment.

D **[39]** In conclusion, I find that the plaintiffs application herein without merits to support for the injunctive relief they seek for. In this case, I find that there are material disputes as to the facts of the matter which cannot be disposed by evidence merely submitted through affidavits. There are serious triable issues as well. The parties should have the benefit of cross-examination E of the respective experts and all the deponents of the affidavits as well as all the material witnesses to determine the relevant issues, including the purported deleterious effects of the station. Taking into consideration all the facts in this case, it is only proper and just for the status quo of the parties be maintained until the final disposal of the suit. This point found support F in the case of *Kamalambikai w/o Somasundram & Anor v Mulpha Land & Property Sdn Bhd* [1998] MLJU 173, wherein Abdul Wahab J had stated:

> To stop a person entirely from undertaking any activity for which he has received the approvals of the relevant authorities in accordance with the law, at all times G within the boundary of his land, before the issues are determined in a trial is intrinsically or prima facie unjust. That injustice is usually mitigated by an undertaking as to damages. In this case, the plaintiffs in terms of an undertaking as to damages have offered nothing. Neither has the plaintiffs made out a clear case why such undertaking should be dispensed with in this case.
>
> H
>
> In any application, including interlocutory applications, it is incumbent upon the applicant to make out his case. There is no presumption that an interlocutory application is necessarily granted to preserve a 'status quo' and imposing a burden upon a defendant to show why the application is not to be granted. Indeed, to my mind, the status quo includes the defendant continuing with work that he had I already commenced …

[40] After weighing all the matters adumbrated above I find that the defendants would suffer greater injustice by the grant of the injunctions

sought, than by its refusal. I am of the view that the status quo should be maintained. In the result I dismiss the plaintiffs' application for injunctive relief with costs.

Plaintiffs' application dismissed with costs.

Reported by Kohila Nesan